SUPREME COURT, U. S.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 300

ALBERT H. GRISHAM,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

Albert H. Grisham petitions for a writ of certiorari to review the judgment of the United States Court of Claims entered April 19, 1968.

OPINION BELOW

The opinion of the United States Court of Claims dated April 19, 1967, is not yet reported, but is printed in the Appendix hereto, pages 20-35.

JURISDICTION

The judgment of the Court of Claims was dated and entered April 19, 1968.

The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTIONS PRESENTED

1. Whether the Court of Claims, in an action for back pay, is empowered to review the validity of a court-martial conviction during the period the claimant is serving a sentence of imprisonment imposed by the court-martial and prior to the determination by this Court upon habeas corpus that the proceedings and imprisonment were unconstitutional.

2. Is a back pay action barred by laches if the claimant fails to file it while serving a sentence of imprisonment imposed by a court-martial but which was filed after the court-martial conviction was held by this Court to be unconstitutional and if the claim for lost pay was limited to only a portion of the period of the imprisonment.

3. Is the United States barred from asserting laches if the delay in filing a back pay action was caused by its wrongful conduct (a) in convening an unconstitutional court-martial which sentenced the claimant to prison and which illegally imprisoned him and (b) in illegally removing claimant from his civil service position by proceedings which the United States conceded were procedurally defective and which were concealed from him.

STATUTES AND MANUAL INVOLVED

Article 76 of the Uniform Code of Military Justice, 10 U.S.C. 876, provides:

> **Finality of proceedings, findings, and sentences**
>
> The appellate review of records of trial provided by this chapter, the proceedings, findings, and sentences of courts-martial as approved, reviewed, or affirmed as required by this chapter, and all dismissals and discharges carried into execution under sentences by courts-martial following approval, review, or affirmation as required by this chapter, are final and conclusive. Orders publishing the pro-

> ceedings of courts-martial and all action taken pursuant to those proceedings are binding upon all departments, courts, agencies, and officers of the United States, subject only to action upon a petition for a new trial as provided in section 873 of this title (article 73) and to action by the Secretary concerned as provided in section 874 of this title (article 74), and the authority of the President.

Article 74 of the Uniform Code of Military Justice, 10 U.S.C. 874(a), provides:

> **Remission and suspension**
>
> (a) The Secretary concerned and, when designated by him, any Under Secretary, Assistant Secretary, Judge Advocate General, or commanding officer may remit or suspend any part or amount of the unexecuted part of any sentence, including all uncollected forfeitures other than a sentence approved by the President.

Paragraph 214b, U.S. Dept. of Defense, *Manual for Courts-Martial, United States,* 1951, promulgated by Exec. Ord. No. 10214, February 8, 1951, provides in relevant part as follows:

> *Exhaustion of remedies.*
>
> * * *
>
> Prior to the exhaustion of the remedies of appellate review and petition for new trial which are available to an accused person * * * a resort to habeas corpus to test the legality of restraint imposed pursuant to a sentence of a court-martial is inappropriate and premature.
>
> * * *

STATEMENT

The jurisdiction of the Court of Claims was invoked under 28 U.S.C. 1491(1), (2) and (3).

The Court of Claims here asserted unlimited power to determine the validity of a court-martial conviction, holding it could give full relief, including invalidating the court-

martial, at any time, even while the sentence of imprisonment imposed is being served. Respondent supported that holding, but disputed that court's power to do so in *Augenblick v. United States,* Ct. Cl. 1967, 377 F.2d 586, and *Juhl v. United States,* Ct.Cl. 1967, 383 F.2d 1009. On Petition of Respondent certiorari was granted for both cases April 29, 1968 (No. 1212, October Term, 1967) 20 L.Ed. 2d 300. The instant case is much more serious to the court-martial system. Petitioner was imprisoned. Augenblick and Juhl were not. Conflicts exist among federal courts as to the scope of reviews by civil courts of court-martial convictions in view of the finality accorded those convictions by Article 76, Uniform Code of Military Justice, 10 U.S.C. 876.

The basic facts involved follow.[1]

Petitioner, a civilian cost accountant, of the Nashville District Engineer's Office, Corps of Engineers, United States Army, Nashville, Tennessee, was detailed to its Orleans, France, installation for six months' temporary assignment beginning October 1, 1952. He was tried in France by an Army general court-martial between March 20-27, 1953, for the capital offense of premeditated murder as defined in Article 118(1) of the Uniform Code of Military Justice, 10 U.S.C. 918(1). He was found guilty of unpremeditated murder and sentenced to confinement at hard labor for life. (The sentence was reduced in 1957 to 35 years). The United States Court of Military Appeals affirmed September 24, 1954 acting on his application for review. *United States v. Grisham,* 4 USCMA 694. On October 26, 1957, while serving this sentence, he filed a petition for habeas corpus claiming Article 2(11) of the Uniform Code of Military Justice, 10 U.S.C. 802(11), was unconstitutional as applied to him because he was entitled to a trial by jury. The writ was dismissed, *Grisham v. Taylor,* D.C., 161

[1] These facts are taken from the Findings and Opinion of the Court of Claims and of its Commissioner's report, and from the Appendices and Record as indicated.

F.Supp. 112, and the Court of Appeals affirmed, *Grisham v. Taylor,* 3 Cir., 261 F.2d 204. This Court reversed January 18, 1960, holding *Reid v. Covert,* 354 U.S. 1, controlled and, therefore, he was entitled to a jury trial, *Grisham v. Hagan,* 361 U.S. 278. He was released from prison February 5, 1960, and until then had been continuously confined since December 6, 1952.

He was carried on the rolls of the Nashville District Engineer's Office during the six months' temporary assignment in France. Upon his departure for France, September 30, 1952, another employee was temporarily transferred to his Nashville position. That transfer was made permanent six months later. He was purportedly removed from his position with the Corps of Engineers February 28, 1954. The parties conceded that Form 50, Notification of Personnel Action, recording his removal, was mailed to him but never received. The Court of Claims failed to mention but its Commissioner found and Respondent conceded this removal was procedurally defective because of the failure to give the required notifications and an opportunity for a hearing.[2]

In 1961 Petitioner filed an application to correct his military records and to remove the error and injustice of the

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[2]Commissioner's Report, (R 75) states:

"***defendant concedes that the removal***was procedurally defective because of failure***to give***an advance written notification of the proposed action, including a statement of the reasons for it, and the failure to afford***an opportunity to submit a responsive statement showing why***such administrative action should not be taken."

Petitioner, a veteran, was entitled to these safeguards as required by Section 14 of the Veterans Preference Act of 1944, 58 Stat. 390 (1944), as amended 61 Stat. 723 (1947) 5 U.S.C. 863 (1964 ed.).

Army Personnel Regulation, CPR S.1.4-2.3 (App. 34) provides: "Removals will not be effective *** prior to the date the employee has *received* notice of the adverse decision". (Emphasis in regulation). The removal was void because he never received the notice required. *Vitarelli v. Seaton,* 359 U.S. 535; *Service v. Dulles,* 354 U.S. 363.

unconstitutional court-martial with The Army Board for Correction of Military Records which denied it July 27, 1961, without a hearing and without findings.

On November 15, 1962, he filed a claim for back pay in the Court of Claims which dismissed it five and one-half years later on April 19, 1968, applying laches.[3]

Petitioner did not seek restoration to his position. In a communication[4] of August 25, 1953, the Nashville District Engineer's Office stated his re-employment was prohibited and his removal necessary due to personnel regulations.

In December, 1952, his bank balance was $113.00 and accumulated annual leave was $909.27, which was paid to him while in prison between December 6, 1952 and February 23, 1953. While working in the prison industries he received a gratuity of $50.00 to $60.00 a month, some of which he sent to his three minor children and the remainder he used for personal needs. In November, 1957, he withdrew all of his civil service retirement funds amounting to $2,419.55. From these he sent $1,000.00 to his children and applied the balance to the expenses of his habeas corpus proceedings. No other funds were available and there were no known sources to obtain any. In March, 1960, one month after being released from prison, he began working as a clothing salesman. Earnings did not exceed $50.00 a week from then until March, 1961. Thereafter and until November, 1962, when this back pay action was filed, earnings were between $4,500.00 and $4,800.00 a year. His civil service salary was $5,310.00 per year and while overseas he was given an allowance of $12.00 a day.

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[3]The claim was later limited to salary for a portion of the period of imprisonment–from February 24, 1953 to February 5, 1960.

[4]This states: "Existing regulations would prohibit his employment again in this District, i.e., under provisions of Dept. of Army Civilian Personnel Regulation S1.4 it will be necessary to remove him". (R 48).

REASONS FOR GRANTING THE WRIT

The Court of Claims dismissed this back pay action applying laches. It held there was an unexplained lapse of time from October 11, 1957, the date of an unofficial letter from his friend in the Nashville District Engineer's Office (App. 36) stating he was removed from his position in 1954. That doctrine was improperly applied because there was neither prejudice nor an unreasonable or unexplained delay. The evidence must prove both to establish laches.

An inquiry into the power of the Court of Claims to review court-martial convictions is necessarily involved because it concluded that laches commenced while the court-martial sentence of imprisonment was being served. It did not consider, however, the finality provision of Article 76, Uniform Code of Military Justice, 10 U.S.C. 876. It relied upon and adhered to its prior opinion in *Jackson et al. v. United States*,[5] 179 Ct.Cl. 29, cert. denied 389 U.S. 985. In *Jackson*, 179 Ct.Cl. p. 38, and therefore in the instant case since it was based on *Jackson*, that court sweepingly concluded and also without considering the finality clause, it could give *full relief*, including invalidating the court-martial conviction, *at all times*, even while the court-martial sentence of imprisonment is being served. This ruling circumvents the reviews provided for by the United States Code of Military Justice and is contrary to *Burns v. Wilson*, 346 U.S. 137, and *Gusik v. Schilder*, 340 U.S. 128. Reviews during the period a sentence of imprisonment is being served should be sparingly allowed and then only by a civil court having power to release the prisoner from custody, otherwise the review would be pointless. The Court of Claims is without that power. It

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[5]In *Jackson* the plaintiffs did not seek habeas corpus but waited until their sentences of imprisonment were served to seek declaratory relief in the District Court establishing the unconstitutionality of their convictions relying upon Petitioner's case, *Grisham v. Hagan*, 361 U.S. 278.

would be futile for Petitioner to have filed a back pay action while imprisoned because then he could not work and the claim would be dismissed upon the affirmative defense he was not *then* "ready, willing and able" to work. While imprisoned he sought relief by habeas corpus which was unsuccessful until January 18, 1960, when this Court held his court-martial unconstitutional. *Grisham v. Hagan,* supra.

Petitioner should not be penalized for pursuing habeas corpus, the traditional and accepted method of determining the validity of a detention, nor should he be expected to turn his back on reality and file a futile action in the Court of Claims knowing it was without power to enforce his release from prison.

1. Conflicts exist among federal courts as to the scope and extent of reviews of court-martial convictions and sentences. Respondent is inconsistent in its contentions whether the Court of Claims has that power. This Court should resolve those conflicts.

Article 76, Uniform Code of Military Justice, 10 U.S.C. 876, provides that once the military reviews are exhausted court-martial sentences are "final and conclusive" and "all action taken pursuant to those proceedings are binding upon all * * * courts * * * *".

This Court considered the issue of whether or not the Court of Claims has power to review court-martial convictions serious enough to have granted certiorari on Respondent's petition in *Augenblick v. United States,* Ct.Cl. 1967, 377 F.2d 586 (Jencks Act violation denied due process voiding the court-martial conviction) and *Juhl v. United States,* Ct.Cl. 1967, 383 F.2d 1009 (court martial conviction void because uncorroborated testimony of accomplice admitted in violation of the Manual for Courts-Martial, United States, 1951). Certiorari granted, both cases, 20 L.Ed. 2d 300, April 29, 1968 (No. 1212, October Term, 1967). The District of Columbia Circuit in *Gallagher v. Quinn,* 363 F.2d 301 (1966) cert. denied 385 U.S. 881

held the finality provision was no barrier to its deciding whether the statute establishing the United States Court of Military Appeals was constitutional. Opinions of the First Circuit and of the United States Court of Military Appeals conflict with the above opinions of the Court of Claims and District of Columbia Circuit. In *Davies v. Clifford*, 393 F.2d 496 (1968) the First Circuit refused a declaratory judgment that a court-martial conviction was void holding it had no jurisdiction to review a final and binding judgment of the United States Court of Military Appeals which had refused earlier to void the conviction. It specifically refused to follow *Quinn* and *Augenblick*, both supra. 393 F.2d p. 497, note 2. The United States Court of Military Appeals in *United States v. Armbruster*, 11 U.S.C.M.A. 596, 29 C.M.R. 412, held that, except for review by the Supreme Court upon constitutional questions, its judgments were final and binding upon all, including the Court of Claims and the Comptroller General. It prohibited the Government from obtaining a conflict in military law by seeking an opinion from the Comptroller General.

The United States Court of Military Appeals granted a discretionary review but affirmed Petitioner's conviction. *United States v. Grisham*, supra. In the instant case the Court of Claims by ignoring this judgment of the Court of Military Appeals failed to accord that judgment the finality and binding effect the Military Code required.

Respondent is inconsistent in its contentions whether the Court of Claims is empowered to review court-martial convictions. In Petitioner's case[6] and in *Jackson et al. v. United States*, supra, it contended successfully the Court of Claims did have such power even while the sentence of imprisonment imposed is being served. However, in *Augen-*

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[6] For example: "However, if the instant plaintiff were not validly fired or placed on leave without pay he could have sought a money judgment for the salary of his position as early as 1953". This and other typical statements are in the Appendix p. 38.

blick and *Juhl*, both supra, it unsuccessfully contended that court did not have that power.

2. In holding it could decide in a back pay action the validity of a court-martial conviction while the sentence of imprisonment is being served the Court of Claims decided an important question involving the interpretation and administration of federal military law which has not been, but should be, settled by this Court.

The reviews required by Articles 64, 66, 67 and 71 of the Uniform Code of Military Justice, (10 U.S.C. 864, 866, 867, 871), assure a careful "policing" of the court-martial proceedings. *Gusik v. Schilder*, supra, 340 U.S. p. 132. If this policing is permitted to continue without hindrance a civil court review may be needless because the military may grant a new trial, vacate, reverse, reduce or remit the sentence. These Articles clearly forbid any interference by any civil court, even by habeas corpus, during the court-martial proceedings and through the reviews by the United States Court of Military Appeals. *Burns v. Wilson*, 340 U.S. 128, 133; *Gusik v. Schilder*, supra, 340 U.S. p. 132; *Hooper v. Hartman*, 9 Cir. 1959, 274 F.2d 429; *Hooper v. United States*, Ct.Cl. 326 F.2d 982, 984, cert. denied 377 U.S. 977; *Levy v. Resor*, 4 Cir. 1967, 384 F.2d 689, cert. denied 389 U.S. 860 (1968); *Branford v. United States*, 7 Cir. 1966, 356 F.2d 876, 877; Paragraph 214b, Manual for Courts-Martial, United States, 1951,[7] provides that until military reviews are exhausted "a resort to habeas corpus to test the legality of restraint is inappropriate and premature". A deliberate by-pass of these available military reviews should not be tolerated either by habeas corpus, injunction, declaratory relief, mandamus, or by a back pay action. Cf. *Warden, Maryland Penitentiary v. Hayden*, 387 U.S. 294; *Fay v. Noia*, 372 U.S. 391, 398-399, 438-439.

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[7]This Manual has the force of law, *Ex Parte Reed*, 100 U.S. 13, 22; *United States v. Smith*, 105 CMR 32.

If the Court of Claims is permitted to give full relief at all times there will be neither need nor perhaps opportunity for the reviews the Uniform Code of Military Justice requires or permits. If that court may review at any time it could intervene when the court-martial charges are served, during the pre-trial and trial phases, and during the appellate reviews.

Civil court reviews *during* imprisonment should be severely limited because they too may be needless. Article 74, of the Uniform Code of Military Justice, 10 U.S.C. 874(a) permits the military to "remit or suspend any part or amount of the unexecuted part of any sentence". Implementing regulations (App. 39-40) continued this authority even if confinement is in a federal facility to assure uniform treatment and execution of sentences "regardless of place of imprisonment". *Blackwell v. Edwards,* 303 F.2d 103, 108. Only a civil court having power to release from custody should be permitted to review court-martials during the imprisonment phase. Without the power to release from custody the power to review would be useless. The Court of Claims does not have power to grant habeas corpus, 28 U.S.C. 2241, nor may it issue an injunction or other writ. *King v. United States,* Ct.Cl. 1968, 390 F.2d 894, 905. Equating a back pay action with habeas corpus is not justified. Habeas corpus is a swift and imperative writ to determine the legality of detention and to obtain immediate release if the detention is illegal. *Peyton v. Rowe,* 1968, __ U.S. __, 20 L.Ed. 2d 426, 433, 88 S.Ct. __; *Carafas v. La Vallee,* 1968, __ U.S. __, 20 L.Ed. 2d 554, 559, 88 S.Ct. __; *Fay v. Noia,* 372 U.S. 391, 438. A back pay action does not have the imperative swiftness of habeas corpus as is so evident here. It took five and one-half years to decide this action.

A back pay action filed during imprisonment would be futile because Petitioner could not work. The claim, therefore, would be dismissed upon the affirmative defense he

was not *then* "ready, willing and able" to work[8] which the Court of Claims often imposes and Respondent relied upon below (App. 38). *United States v. Wickersham*, 201 U.S. 390; *Everett v. United States*, Ct.Cl., 340 F.2d 352, 354-357. If such a suit had been filed then it would be condemned as a "protective suit" would remain "quiescent" and be "a mere formality—a procedural trap for the unwary and an additional complication for those who manage the dockets of the courts". *Crown Coat Front Co., Inc. v. United States*, 386 U.S. 503, 515. The wisdom of this admonition is evident. If filed during imprisonment this back pay action would be quiescent until 1988, the end of the 35 years' reduced sentence, and Petitioner would then be 72, and being over 70 automatically separated from the service. (5 U.S.C. 8335(a)).

3. We borrow the following as pertinent from Respondent's Petition for Certiorari (pp. 27-28) in *Augenblick* and *Juhl*, supra:

> "The questions raised by the instant cases have a long reach. We are advised that during the period from July 1, 1962 to July 1, 1967, over 16,000 persons were convicted by general court-martial, with approximately 80,000 convictions by all types of court-martial during this period. The six-year statute of limitations in the Court of Claims (28 U.S.C. 2501) makes each of these persons a potential litigant in the civil courts. If the scope of review asserted by the Court of Claims in these cases is left uncorrected, it is not unlikely that there will be a considerable influx of suits for back pay to test court-martial convictions. At present, there

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[8]The Government may not assert this defense if it illegally prevents the employment. *Seebach v. United States*, 182 Ct.Cl. __ (1968) and *Rabineau v. United States*, 182 Ct.Cl. __ (1968). See also *Keith v. United States*, 174 Ct.Cl. 284, 290. Until the court-martial sentence was invalidated Petitioner could be reasonably kept from work. After invalidation that became unreasonable and he may recover for the period he was illegally kept from employment. *Seebach*, supra.

are four more such actions pending in the Court of Claims. Furthermore, a decision by this Court in the instant cases would have a substantial bearing on the 23 cases pending in the other federal courts seeking collateral review of court-martial convictions (only ten of which are on writ of habeas corpus). Continuing growth in the size of our armed forces adds to the prospective significance of the questions here presented.

"Moreover, apart from the immediate practical consequences, the questions raised are of considerable doctrinal importance. Congress has set up a well considered and well conducted system of military justice, headed by a civilian Court of Military Appeals. In the ordering of government and the allocation of functions, it is not appropriate or wise that this system should be subject to review on matters of detail by the Court of Claims, which is not a general court of review but is a special tribunal established to provide a means for suits against the government on contract and tort claims. One of the vital functions of this Court is to determine and preserve the proper allocation of powers among other federal tribunals; that role should be exercised in this case."

The power the Court of Claims asserts to review court-martial convictions at all times and to give full relief will break down the court-martial system and is not necessary. The federal district and appellate courts on habeas corpus may provide a full and fair review of court-martial convictions for persons serving a sentence of imprisonment. Practical considerations require that only a civil court having power to release from custody review such convictions, otherwise a review would be pointless. The Court of Claims does not have that power.

Petitioner is convinced the Solicitor General will concede the judgment below is serious and far reaching and will consent that certiorari be granted to review it.

4A. Unreasonable or unexplained delay and prejudice were not proved. The evidence must show both elements to establish laches. *Costello v. United States,* 365 U.S. 265, 282; *Southern Pac. Co. v. Bogert,* 250 U.S. 483, 489; *United States ex rel. Arant v. Lane,* 249 U.S. 367, 372; *Powell v. Zuckert,* D.C. Cir. 1966, 366 F.2d 634, 636; *Van Bourg v. Nitze,* D.C. Cir. 1967, 388 F.2d 557, 565; *Todd et al. v. United States,* 155 Ct.Cl. 87, 94.

The delay was neither unexplained nor unreasonable. Military reviews of the court-martial were pursued and exhausted orderly and diligently as they became available. They were exhausted September 24, 1954 when the United States Court of Military Appeals affirmed acting upon Petitioner's request for discretionary review. *United States v. Grisham,* supra. Until exhaustion of military remedies habeas corpus was premature. His petition for habeas corpus was filed October 27, 1957, not long after *Reid v. Covert* was decided on rehearing June 10, 1957, 354 U.S. 1, two Justices dissenting, which held that civilian dependents of service men were not subject in peacetime to court-martial. Petitioner's habeas corpus quest was not successful in the District Court, *Grisham v. Taylor,* 161 F.Supp. 112, nor in the Court of Appeals, *Grisham v. Taylor,* 3 Cir., 261 F.2d 204. This Court reversed holding that *Reid v. Covert* controlled and, therefore, his court-martial conviction was unconstitutional. *Grisham v. Hagan,* 361 U.S. 278, two Justices dissenting. *Reid v. Covert* was pending in the federal courts for most of the time Petitioner was imprisoned. The history of that case demonstrates the constitutional question was serious and troublesome. Petitioner, an imprisoned layman, like a policeman is not expected to predict the course of constitutional law. *Pierson v. Ray,* 386 U.S. 547, 557. Until this Court decided the invalidity of the court-martial conviction no back pay action would have been successful, the sentence of imprisonment being final and conclusive and Petitioner reasonably could be kept away from work. A cause of action did not accrue until February 5, 1960, when he was

released from prison. Until the claim matures laches cannot be charged. *Consaul v. Cummings*, 222 U.S. 262; *Galiher v. Caldwell*, 145 U.S. 368, 372.

Respondent cannot take advantage of its own wrong in unconstitutionally court-martialing and keeping Petitioner away from his employment. This principle is applicable in actions at law as well as in equity. *Glus v. Brooklyn Eastern District Terminal*, 359 U.S. 231, 232-233; *Deitrick v. Greaney*, 309 U.S. 190, 196; *Holmberg v. Armbrecht*, 327 U.S. 392, 396; *O'Brien v. United States*, 148 Ct.Cl. 1, 3. Concealing the removal proceedings from Petitioner amounts to a fraudulent concealment precluding Respondent from asserting laches. *Holmberg v. Armbrecht*, supra. *Bailey v. Glover*, 88 U.S. (21 Wall) 342.

When Congress in 1901 enacted the District of Columbia statute of limitations it established national policy that imprisonment was a disability tolling it.[9] The same rule was enacted in California where Petitioner resided when he filed the action below. Section 352, Code of Civil Procedure, as interpreted in *Leeper v. Bettrami*, 347 P.2d 12, 21, 53 Cal. 2d 195 (In Banc). Imprisonment should also excuse the application of laches in the instant case.

The Court of Claims failed to mention but its Commissioner found (R. 75) and Respondent conceded (Note 2 above) that Petitioner's removal from his position was procedurally defective. There is no evidence in the record or findings by the Court of Claims or its Commissioner of loss of relevant documents.[10] The testimony of Pearle Kessler,

[9]D.C. Code, 1967 edition, Sec. 12-302(a), ***When a person entitled to maintain an action, is at the time the right of action accrues: ***(3) imprisoned–he***may bring an action within the time limited after the disability is removed".

On matters of evidence and some procedures the Court of Claims follows the rules of the United States District Court for the District of Columbia. See Rule 49(a) of the Court of Claims.

[10]What Pearle Kessler's testimony would be is purely speculative and there is no clue as to what it might have been. It could be favor-

alluded to by the Court of Claims in its opinion and the alleged loss of documents relate, if at all, to the purported removal of Petitioner from his position. Since that was conceded to be procedurally defective it is no longer a litigable issue. The testimony and records, if any, therefore, are irrelevant and immaterial. Nor was there any monetary loss. Prejudice, therefore, was not proved.[11]

In many similar situations the doctrine of laches has not been applied such as: If as here, the claimant has been imprisoned, needs time to rehabilitate and retain a lawyer, who needs time to investigate and prepare the claim. *Mallow v. United States,* 161 Ct.Cl. 207. If a substantial statutory question exists, and here there was a constitutional one. *O'Brien v. United States,* 151 Ct.Cl. 392, 395. If, like here, an action would be futile. *Alpert v. United States,* 161 Ct.Cl. 810, 822. Petitioner was impoverished after his release from prison. He filed an application with the Correction Board, as hereafter appears, and his back pay claim as soon as he was able. While proverty alone may be insufficient to defeat laches it should be taken into the account. *Powell v. Zuckert,* supra, 366 F.2d pp. 637-638.

Though Petitioner did not seek restoration to his position, as the court below noted, that is not a condition precedent to an award of back pay. *Greenway v. United States,* 163

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able to Petitioner, i.e., Form 50 was not mailed to him because his location was not known for such a long time and the Nashville office records had been sent to St. Louis. She did not, but should have, sent him a copy of Form 50, recording his removal. She mailed him other copies of official documents.

[11] There is no monetary prejudice. This claim is only for a portion of the period of imprisonment—February 24, 1953 to February 5, 1960 when released from prison. It would have been no greater if filed February 5, 1960, than November 15, 1962. Cf. *Chappelle v. United States,* 168 Ct.Cl. 362, 366. When Petitioner left for France September 30, 1952, his position was filled by a temporary transfer of another employee which was made permanent six months later. A transfer like this does not constitute prejudice. *Duncan v. Summerfield,* D.C. Cir., 251 F.2d 896, 897-898; *Ainsworth v. United States,* 180 Ct.Cl. 166, 172.

Ct.Cl. 72, 76. Cf. *Chappelle v. United States,* 168 Ct.Cl. 362, 366. The Nashville District Engineer's Office rendered impossible any attempt at restoration when it concluded existing regulations precluded rehiring and required removal of him. (See note 4).

B. The Court of Claims said Petitioner failed to prove prison authorities prevented filing the suit while in prison. Two of its unjust conviction opinions were cited to prove it was always open to receive prisoners' claims. *Smith v. United States,* 168 Ct.Cl. 242 (1964) and *Webster v. United States,* 179 Ct.Cl. 917 (1967). The issue, however, is not whether an action can be filed but whether it can be effective if filed. It has been shown such an action if filed during imprisonment could not be effective. The Unjust Conviction Act (28 U.S.C. 1495, 2513) gives the Court of Claims jurisdiction in such cases. No statute empowers it to release one from prison, however. The certificate of innocence required by the Unjust Conviction Act could not be obtained from the *ad hoc* court-martial because (a) when the conviction was invalidated Article 63 of the Uniform Code of Military Justice, 10 U.S.C. 863, precluded a rehearing before the same court-martial, and (b) the members of the court-martial would have been scattered by military duty making re-assembly impractical. *Jackson v. Taylor,* 353 U.S. 569, 579. The District Court and the Court of Appeals, in view of their adverse comments undoubtedly would refuse a certificate of innocence. This is an optional remedy, anyway.

3. After release from prison Petitioner filed an application for correction of his military records and to remove the error and injustice of the unconstitutional court-martial conviction with the Army Board for Correction of Military Records which was denied without a hearing and without findings July 27, 1961. This mode of obtaining relief from court-martial convictions was suggested for those not in custody by *Goldstein v. Johnson,* D.C. Cir., 184 F.2d 342, 343-344. If this application was in error laches would be excused because the delay in filing the back pay claim was

caused by a reasonable mistake as to the proper procedure. *Ritter v. Strauss,* D.C. Cir. 1958, 261 F.2d 767, 772. That Board could and should have given full administrative relief. *Van Bourg v. Nitze,* D.C. Cir., 388 F.2d 557; *Ashe v. McNamara,* 1 Cir., 355 F.2d 277. Failure to grant a hearing and make findings was erroneous. *Van Bourg,* supra.

4. The Court of Claims departed so far from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision.

There were irrelevant and prejudicial statements below that Petitioner (a) was divorced (R. 12, App. 26), (b) stood mute at his court-martial trial (R. 69, 81, App. 23, 29, 34) and (c) was guilty of committing the crime in some ways but not in others as charged (R. 69, 70, 81, App. 23, 30).

The divorce has no relationship to anything involved.

Petitioner stood mute at his trial but Congress gave him the right to do so if he be so advised. Article 45, Uniform Code of Military Justice, 10 U.S.C. 845. It is impermissible to use this at a criminal trial. *Miranda v. Arizona,* 384 U.S. 436, p. 468 note 37. It may not be used in back pay claims because the principles of the criminal law are looked to for guidance in such cases. *Williams v. Zuckert,* 371 U.S. 531, pp. 533-534, dissenting opinion of Justice Douglas; *Greene v. McElroy,* 360 U.S. 474, 496; *Peters v. Hobby,* 349 U.S. 331, 344-345.

Court martial charges, like an indictment, are not evidence. Cf. *Tot v. United States,* 319 U.S. 463, 466; *In Re Oliver,* 333 U.S. 257. When this Court struck down the Uniform Code of Military Justice, Petitioner was innocent of any crime against the United States. *Ex Parte Siebold,* 100 U.S. 371, 376-377; *Chicago Ind. and L. Ry. Co. v. Hackett,* 228 U.S. 559, 566. It is not the function of the Court of Claims to determine criminal innocence or guilt. Cf. *Bumper v. North Carolina,* __ U.S. __, 88 S.Ct. __, 20 L.Ed.2d 797, 803 note 16 [12] (1968).

The irrelevant, immaterial and prejudicial matters referred to above regardless of source have no place in judicial findings, opinions or reports and were beyond fair judicial comment.

5. Petitioner is entitled to his back pay no matter how ignoble some may judge him to be. *Bell v. United States,* 366 U.S. 393, 401-402. Since his removal was procedurally defective he is entitled to back pay and unpaid overseas allowance. *Williams v. Brown,* D.C. Cir. 1967, 384 F.2d 981, 983-984; *Hanifan v. United States,* Ct.Cl. 1965, 354 F.2d 358, 364. Cf. *Vitarelli v. Seaton,* supra; *Service v. Dulles,* supra.

CONCLUSION

Wherefore, Petitioner prays that the writ of certiorari be granted. This is the first occasion the Court has had to review the jurisdiction of civil courts in court-martial cases of this type since its 4 to 4 decision in *Burns v. Wilson* in 1953. The Court has granted certiorari in two cases raising the issue of the scope of the reviewing power of the Court of Claims. The present case involves an equally if not more important aspect of the same issue, which the Court should consider in order to give a definitive view of the jurisdictional issue. However, should the Court be of the view that the *Augenblick* and *Juhl* cases presently set before the Court adequately present the issues, it is requested that the Court defer action on the present petition until the decisions in those cases are rendered, so that petitioner may at least have the benefit of any jurisdictional ruling the Court may make in those cases insofar as it bears on the present case.

Respectfully submitted,

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APPENDIX A

In the United States Court of Claims

No. 363–62

(Decided April 19, 1968)

ALBERT H. GRISHAM v. THE UNITED STATES

Lawrence J. Simmons, attorney of record, for plaintiff. *H. Clay Espey* and *Charles W. Kalp*, of counsel.

Edgar H. Twine, with whom was *Assistant Attorney General Edwin L. Weisl, Jr.* for defendant.

Before COWEN, *Chief Judge*, REED, *Justice* (Ret.) sitting by designation, LARAMORE, DURFEE, COLLINS, SKELTON, and NICHOLS, *Judges*.

OPINION

LARAMORE, *Judge*, delivered the opinion of the court:*

Plaintiff, Albert H. Grisham, a former civilian employee of the Corps of Engineers, Department of the Army, sues to recover his salary (and other benefits) for the period beginning December 7, 1952 and continuing thereafter.[1]

Plaintiff began his career as a civilian employee of the Corps of Engineers on October 26, 1936, when he received a probational appointment as a junior clerk (CAF–2) in the

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*We are indebted to Trial Commissioner Mastin G. White for his opinion, findings of fact and recommended conclusion of law submitted pursuant to the order of reference and Rule 57(a). We have adopted much of what the commissioner has written and arrive at the same result for different reasons.

[1] Plaintiff has withdrawn any claim for pay since he was released from prison on February 5, 1960 and from December 7, 1952 to February 23, 1953 when he was on annual leave status for which he was paid. Therefore, plaintiff's claim is for pay from February 24, 1953 to the date he was released from prison, *i.e.*, February 5, 1960.

Nashville District. Having successfully completed his probationary period of service, he acquired permanent status in the competitive civil service. Plaintiff continued to serve in the Nashville District until September 30, 1952 (except for a period of active military duty during World War II), and was regarded as a reliable and trustworthy employee. Plaintiff's proficient and capable performance of his assigned duties earned him gradual promotions. On September 30, 1952, he held a position as cost accountant (GS–9) in the Nashville District.

In September 1952, plaintiff was selected for a 6-month temporary duty assignment with the Orleans District Engineers in France. This organization was part of the military command known as the Communications Zone of the United States Army in Europe. He left the Nashville District for the foreign assignment on September 30, 1952. During his absence, the Nashville District employed a person on a temporary basis, for six months, to perform the work previously done by plaintiff, and thereafter it hired a permanent employee.

Following his departure for the temporary foreign assignment, he remained on the rolls of the Nashville District in the GS–9 position to which he had been promoted. The records of the Nashville District showed plaintiff had been loaned to the Orleans District Engineers for six months and was on temporary duty with that organization. Plaintiff arrived in France on October 1, 1952, then went to Orleans and undertook the temporary duty assignment for which he had been sent overseas. Plaintiff's wife, Dolly D. Grisham, did not accompany him to France. She arrived there on or about November 1, 1952, at which time they set up housekeeping in Orleans.

Dolly D. Grisham died on December 6, 1952. Plaintiff was arrested, charged with homicide and held in confinement by the French authorities from December 6 until December 24, 1952.

The United States Army requested jurisdiction over plaintiff, and the French authorities released him to the Army on December 24, 1952. Plaintiff was confined by the Army in the post stockade at La Rochelle, France, and notified that he had

been charged with premeditated murder under Article 118(1) of the Uniform Code of Military Justice (10 U.S.C. § 918(1) (Supp. IV, 1952)).[2]

While in confinement at La Rochelle awaiting the disposition of the charge against him, plaintiff requested the Corps of Engineers to pay him for his annual leave and then carry him in the status of leave without pay until the situation was clarified.

Plaintiff was placed in a leave-with-pay status by the Corps of Engineers retroactive to December 6, 1952. On the basis of the accrued annual leave to his credit, plaintiff was paid his salary for the period from December 6, 1952 through February 23, 1953.

When plaintiff's accrued leave was exhausted, the Nashville District placed him in the status of leave without pay as of February 24, 1953, "pending review of Court Martial Sentence." He was carried in a leave-without-pay status through February 28, 1954.

Plaintiff was brought to trial on March 20, 1953, at Orleans, France, before a general court-martial appointed by Headquarters, USAREUR Communications Zone, United States Army. He was court-martialed under the authority of Article 2(11) of the Uniform Code of Military Justice (10 U.S.C. § 802(11) (Supp. IV, 1952)).[3]

The specification of the charge (a violation of Article 118 of the Uniform Code of Military Justice (10 U.S.C. § 918)) alleged that:

> * * * Albert H. Grisham, European Command, US Army, Orleans District Engineers, a person employed by the US Army and serving with the US Army outside the continental limits of the United States, did, at Orleans, France, on or about 6 December 1952, with premeditation, murder Dolly D. Grisham by means of striking her on the head and body with a bottle, striking

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[2] "§ 918. Art. 118 Murder.

"Any person subject to this chapter who, without justification or excuse, unlawfully kills a human being, when he—

"(1) has a premeditated design to kill; * * *."

[3] "§ 802. Art. 2. Persons subject to this chapter.

"The following persons are subject to this chapter:

* * * * * *

"(11) * * * [P]ersons serving with, employed by, or accompanying the armed forces outside the United States * * *."

her on the head and body with his fist, and kicking her on the head and body with his foot.

When arraigned before the court-martial, plaintiff stood mute. The court-martial entered a plea of "Not Guilty" on his behalf.

The trial continued from March 20 until March 27, 1953. Plaintiff was found "Guilty" of the specification, except for the words "with premeditation" and "striking her on the head and body with a bottle," there having been a finding of "Not Guilty" relative to the excepted words. The court-martial sentenced him to confinement at hard labor for the term of his natural life.

Plaintiff's conviction was reviewed by the appointing authority, and the findings and sentence were approved on July 8, 1953. Subsequently, the findings and sentence were affirmed by a Board of Review in the Office of the Judge Advocate General of the Army, and by the Court of Military Appeals.

In late July or early August of 1953, plaintiff was transferred to the United States Penitentiary at Lewisburg, Pennsylvania, where he was confined for the next six and one-half years. In 1957, his sentence was reduced by the Secretary of the Army from confinement for life to confinement for 35 years.

On February 26, 1954, the Nashville District prepared a Notification of Personnel Action (Standard Form 50) addressed to the plaintiff. The Notification stated as follows:

> Your separation for notorious misconduct will be effected at the close of business 28 February 1954.
>
> This action is taken after your continued leave without pay since 24 February 1953, pending Court Martial Sentence, and your subsequent life sentence to Federal Prison for criminal action.

As indicated by this document, plaintiff was removed from his position as a cost accountant, GS–9, with the Nashville District effective at the close of business on February 28, 1954. Plaintiff never received the Notification which, admittedly, was mailed to him. An informal letter mailed to plaintiff on October 11, 1957, by an acquaintance in the Nashville District Office, advised him of his removal.

Following the second decision by the United States Supreme Court in the case of *Reid* v. *Covert*, 354 U.S. 1 (1957), plaintiff, on October 26, 1957, filed a petition for a writ of habeas corpus in the United States District Court for the Middle District of Pennsylvania. The petition (alleging that the general court-martial lacked jurisdiction over a civilian employee prosecuted for a capital offense in peacetime) was denied (*Grisham* v. *Taylor*, 161 F. Supp. 112 (M.D. Pa. 1958)), and the denial was affirmed on appeal (*Grisham* v. *Taylor*, 261 F. 2d 204 (3d Cir. 1958)). The Supreme Court in *Grisham* v. *Hagan*, 361 U.S. 278 (1960), held that the attempt to apply the Uniform Code of Military Justice to the present plaintiff, a civilian employee serving with the Armed Forces outside the United States, was unconstitutional as violative of Article III and the Fifth and Sixth Amendments. This meant that the plaintiff's court-martial conviction was a nullity and wholly void. *Mallow* v. *United States*, 161 Ct. Cl. 446, 450 (1963). Plaintiff was released from the United States Penitentiary at Lewisburg, Pennsylvania, on February 5, 1960. Plaintiff's application, filed on June 9, 1961, with the Army Board for Correction of Military Records, was denied on July 27, 1961, without a hearing, and suit in this court was filed November 15, 1962.

Defendant by way of answer has asserted four affirmative defenses, the fourth of which is the defense of laches. We think plaintiff cannot recover by reason of that defense.

A discharged employee is bound to assert his rights with diligence. Delays by the employee in taking steps to test the legality of his removal may prevent the consideration of his suit on the merits. *See: Alpert* v. *United States*, 161 Ct. Cl. 810 (1963) and cases cited therein at pages 820–821.

Assuming for purposes of this case that the letter dated October 11, 1957, from an employee of the Nashville District Corps of Engineers, was the first information plaintiff had of his February 5, 1954 removal (finding 26) and under plaintiff's theory that this was his first opportunity to sue in this court, he did not file suit until November 15, 1962, slightly more than five years thereafter.

Plaintiff has stipulated herein that subsequent to his incarceration, and from 1957 to the present, the government has been paying someone else the salary, part of which plain-

tiff seeks in this suit. This court has recognized that the duplication of salary occasioned by plaintiff's delay in bringing his action is sufficient prejudice for the application of the principle of laches. *Miner* v. *United States*, 143 Ct. Cl. 801 (1958); *Dion* v. *United States*, 137 Ct. Cl. 166 (1956); *Bovard* v. *United States*, 160 Ct. Cl. 619, *cert. denied*, 374 U.S. 830 (1963); *Albright* v. *United States*, 161 Ct. Cl. 356 (1963); *Alpert* v. *United States*, *supra;* and *Gersten* v. *United States*, 176 Ct. Cl. 633, 364 F. 2d 850 (1966).

In this case the passage of time almost equals the limitations period which plaintiff asserts is applicable. As we said in *Gersten* v. *United States*, *supra*, 176 Ct. Cl. at 636, 364 F. 2d at 852:

> [T]he longer the delay the less need there is to show, or search for, specific prejudice. and the greater the shift to the plaintiff of the task of demonstrating lack of prejudice * * *.

Furthermore, plaintiff's claim is premised on the contention that procedures prescribed by section 14 of the Veterans' Preference Act of 1944, ch. 287, sec. 14, 58 Stat. 390, as amended by Act of August 4, 1947, ch. 447, 61 Stat. 723 and modified by the Act of September 6, 1966, Pub. L. No. 89–554, §§ 7511 and 7512, 80 Stat. 528, were not followed in effecting his placement on leave without pay or his removal. In relation to the removal, because of his delay, records were lost or destroyed pursuant to record disposition instructions. As a consequence thereof, it is not possible to reconstruct with any accuracy the precise personnel procedures that were followed in effecting his removal and his placement on leave without pay. Moreover, because of the long delay in filing suit, employees who might have had knowledge of and been able to offer information concerning the procedures followed, could not remember what had happened.

Mrs. Kessler, who authored the letter of October 11, 1957, previously referred to, died before her testimony could be taken, and prior to her death she had been too ill to testify. Consequently, defendant could no longer establish facts concerning plaintiff's removal, either as to time or procedures followed.

This court, in the recent case of *Jackson* v. *United States*, 179 Ct. Cl. 29, *cert. denied*, 389 U.S. 985 (1967), had occasion

to deal with the doctrine of laches in a case strikingly similar to this wherein the court denied Jackson's claim based on his delay in filing suit. Our statement in that decision is equally applicable to the instant case. The attempt to invalidate a removal is "in no sense dependent upon * * * first securing a reversal of the court-martial convictions, * * *." [At p. 37.]

We adhere to our opinion in *Jackson* v. *United States*, *supra*, and hold that plaintiff has offered nothing by way of justification or excuse for delays that ensued after October, 1957. Imprisonment is not a legal disability under 28 U.S.C. § 2501, which would extend plaintiff's time for filing suit. This is made manifest by the numerous cases through the years in which prisoners confined in Federal or state penal institutions have prosecuted claims in this court. *E.g.*, *Smith* v. *United States*, 168 Ct. Cl. 242 (1964); *Webster* v. *United States*, 179 Ct. Cl. 917 (1967). Plaintiff has failed to show that he was prevented by prison authorities from filing suit.

On the facts before us we conclude that plaintiff's suit is barred by laches. Accordingly, plaintiff is not entitled to recover, and the petition is dismissed.

FINDINGS OF FACT

The court, having considered the evidence, the report of Trial Commissioner Mastin G. White, and the briefs and argument of counsel, makes findings of fact as follows:

1. The plaintiff was born on February 16, 1911. He is a citizen of the United States and is now a resident of California.

2. The plaintiff is a veteran of World War II and, as such, he is a 5-point preference eligible for purposes of the civil service. After performing active military duty during the war, the plaintiff continued to be a member of the United States Army Reserve for several years. As of April 1, 1953, the plaintiff held the rank of Lieutenant Colonel, Quartermaster Corps, United States Army Reserve. The plaintiff was honorably discharged from the Army of the United States on the date mentioned.

3. (a) The plaintiff's first wife divorced him in February 1952. The plaintiff and his first wife were the parents of three children, who were approximately 15, 11, and 7 years

of age, respectively, at the time of the divorce. The plaintiff appeared to care deeply for his children.

(b) Sometime during the period February–September of 1952, the plaintiff married again. The married name of the second wife was Dolly D. Grisham.

4. The plaintiff received a probational appointment to a civilian position as junior clerk, CAF–2, in the Nashville District, Corps of Engineers, United States Army, on October 26, 1936. He successfully completed his probationary period of service, and acquired a permanent status in the competitive civil service. The plaintiff continued to serve as an employee of the Nashville District until September 30, 1952 (except for his period of active military duty during World War II). He was regarded as a reliable and trustworthy employee. By reason of the proficient and capable performance of his assigned duties, the plaintiff was steadily and gradually promoted in the service. As of September 30, 1952, the plaintiff held a position as cost accountant, GS–9, in the Nashville District. His salary in that position was $5,310 per annum.

5. In September 1952, the plaintiff was selected for a 6-month temporary duty assignment with the Orleans District Engineers in France. He left the Nashville District for the foreign assignment on September 30, 1952.

6. Following the plaintiff's departure for his temporary foreign assignment, he was still carried on the roll of the Nashville District in the GS–9 position as a cost accountant to which he had been promoted. The records of the Nashville District showed the plaintiff as having been loaned to the Orleans District Engineers for 6 months and as being on temporary duty with the Orleans District Engineers.

7. (a) When the plaintiff left the Nashville District for temporary duty in France, the Nashville District employed another person on a temporary basis for a period of 6 months to perform the work that the plaintiff had been doing prior to his departure.

(b) At the end of the 6-month period immediately following the plaintiff's departure from the Nashville District for temporary duty in France, the Nashville District perma-

nently employed someone to perform the work which the plaintiff had done prior to his departure for France.

8. The plaintiff arrived in France on October 1, 1952. He went to Orleans and undertook the temporary duty assignment for which he had been sent overseas. While working on this assignment, the plaintiff received an overseas allowance of $12 per day.

9. The plaintiff's wife, Dolly D. Grisham, did not accompany him to France. However, she later went to France, arriving there on or about November 1, 1952, or approximately a month after the plaintiff reached France. The plaintiff and his wife set up housekeeping at 74 Boulevard Alexandre Martin, Orleans, France.

10. The plaintiff's wife, Dolly D. Grisham, died on December 6, 1952.

11. The plaintiff was arrested by French authorities on December 6, 1952 and was charged with homicide. He was held in confinement by the French authorities from December 6 until December 24, 1952.

12. (a) The United States Army requested jurisdiction over the plaintiff, and the French authorities released the plaintiff to the Army on December 24, 1952. The plaintiff was confined by the Army in the post stockade at La Rochelle, France.

(b) On December 24, 1952, the plaintiff was notified that he had been charged with premeditated murder under Article 118(1) of the Uniform Code of Military Justice (10 U.S.C. § 918(1)).

13. While in confinement at La Rochelle awaiting the disposition of the charge against him, the plaintiff requested the Corps of Engineers to pay him for his annual leave and then carry him in a status of leave without pay until the situation was cleared up.

14. (a) The plaintiff was placed in a leave-with-pay status by the Corps of Engineers retroactively as of December 6, 1952. The plaintiff was notified of this action. On the basis of the accrued annual leave to his credit, the plaintiff was paid his salary as a civilian employee of the Corps of Engineers for the period from December 6, 1952 through February 23, 1953.

(b) As of February 24, 1953, the plaintiff's accrued annual leave having been exhausted, the Nashville District of the Corps of Engineers placed the plaintiff in a status of leave without pay "pending review of Court Martial Sentence." Thereafter, the Nashville District carried the plaintiff on its roll as being on leave without pay through February 28, 1954.

(c) Although the plaintiff did not receive any written notification of the action mentioned in paragraph (b) of this finding, the plaintiff was aware that his accrued annual leave was only sufficient to carry him through February 23, 1953, and that his pay as a civilian employee of the Corps of Engineers was discontinued after that date.

15. During the period from February 24, 1953 through February 28, 1954, the plaintiff did not make any protest to the Corps of Engineers about being placed in a status of leave without pay, or over the failure of the Corps of Engineers to pay him his salary, and he did not appeal to the Civil Service Commission with respect to the action of the Corps of Engineers in placing him in such a status or failing to pay him his salary.

16. (a) On March 20, 1953, under the purported authority of Article 2(11) of the Uniform Code of Military Justice (10 U.S.C. § 802(11)), the plaintiff was brought to trial at Orleans, France, before a general court-martial appointed by Headquarters, USAREUR Communications Zone, United States Army.

(b) The plaintiff was charged with a violation of Article 118 of the Uniform Code of Military Justice. The specification of the charge alleged that:

> * * * Albert H. Grisham, European Command, US Army, Orleans District Engineers, a person employed by the US Army and serving with the US Army outside the continental limits of the United States, did, at Orleans, France, on or about 6 December 1952, with premeditation, murder Dolly D. Grisham by means of striking her on the head and body with a bottle, striking her on the head and body with his fist, and kicking her on the head and body with his foot.

(c) When arraigned before the court-martial, the plaintiff (the accused in that proceeding) stood mute. The court-

martial entered a plea of "Not Guilty" on behalf of the plaintiff.

(d) The plaintiff's court-martial trial continued from March 20 until March 27, 1953. At the conclusion of the trial, the court-martial found the plaintiff "Guilty" of the specification, except the words "with premeditation" and "striking her on the head and body with a bottle," there being a finding of "Not Guilty" relative to the excepted words; and the court-martial found the plaintiff "Guilty" of the charge.

(e) The court-martial sentenced the plaintiff to be confined at hard labor for the term of his natural life. The sentence was adjudged on March 27, 1953.

17. While awaiting the processing of the plaintiff's court-martial conviction in accordance with the provisions of the Uniform Code of Military Justice, the Army confined the plaintiff in Mannheim, Germany.

18. The plaintiff's court-martial sentence was reviewed by the appointing authority, and was approved on July 8, 1953.

19. In late July or early August of 1953, the plaintiff was transferred to the United States Penitentiary at Lewisburg, Pennsylvania. He was confined in that penitentiary for the next several years.

20. While confined in the United States Penitentiary at Lewisburg, Pennsylvania, the plaintiff worked in the prison industries. He received approximately $50 or $60 per month on the basis of such work. He usually sent some of this money to his children, and he kept the remainder for the purchase of toilet articles and other personal items.

21. The plaintiff's court-martial conviction was reviewed by a Board of Review in the Office of the Judge Advocate General of the Army. The findings and sentence were affirmed by the Board on February 11, 1954.

22. (a) On February 26, 1954, the Nashville Engineer District prepared a Notification of Personnel Action (Standard Form 50) addressed to the plaintiff. The notification stated as follows:

> Your separation for notorious misconduct will be effected at the close of business 28 February 1954.
>
> This action is taken after your continued leave without pay since 24 February 1953, pending Court Martial

Sentence, and your subsequent life sentence to Federal Prison for criminal action.

(b) Effective at the close of business on February 28, 1954, the plaintiff was removed from his position as cost accountant, GS–9, with the Nashville Engineer District.

(c) The Notification of Personnel Action referred to in paragraph (a) of this finding was mailed by the Nashville Engineer District to the plaintiff, but it was never received by the plaintiff.

23. As of February 26, 1954, and for some time prior to that date, the defendant reasonably believed that the plaintiff had committed an act which could reasonably be classified as a crime for which he could have been imprisoned and which reasonably could be classified as notorious misconduct.

24. On petition, the United States Court of Military Appeals reviewed the plaintiff's court-martial conviction. The court affirmed the findings and sentence on September 24, 1954.

25. In 1957, the plaintiff's sentence was reduced by the Secretary of the Army from confinement for life to confinement for 35 years.

26. By means of a letter dated October 11, 1957 from an employee of the Nashville District, Corps of Engineers, and addressed to the plaintiff in the United States Penitentiary at Lewisburg, Pennsylvania, the plaintiff was informed that he had been officially removed from his civilian position effective at the close of business on February 28, 1954. This was the first definite information received by the plaintiff concerning his removal. The plaintiff testified at the trial that, up until the receipt of the letter dated October 11, 1957, he had assumed that he was being carried in a leave-without-pay status.

27. The plaintiff did not, at any time after receiving the letter dated October 11, 1957, or prior thereto, complain to the Corps of Engineers about his removal from his civilian position, or request that he be restored to such position.

28. The plaintiff did not, at any time after receiving the letter dated October 11, 1957, or prior thereto, appeal to the Civil Service Commission relative to his removal from his civilian position.

29. (a) Following the second decision by the Supreme Court in the case of *Reid* v. *Covert*, 354 U.S. 1 (1957), the plaintiff on October 26, 1957 filed a petition for a writ of habeas corpus in the United States District Court for the Middle District of Pennsylvania. The petition was denied on April 22, 1958 (161 F. Supp. 112).

(b) The plaintiff appealed to the United States Court of Appeals for the Third Circuit. That court on November 20, 1958 (261 F. 2d 204) affirmed the judgment of the District Court.

(c) The Supreme Court reviewed the case on the plaintiff's petition for certiorari. In a decision dated January 18, 1960 (361 U.S. 278), the Court reversed the judgment of the Court of Appeals. The Court held that the attempt to apply the Uniform Code of Military Justice to a civilian employee serving with the Armed Forces outside the United States was unconstitutional as violative of Article III and the Fifth and Sixth Amendments.

(d) Throughout the proceedings referred to in this finding, the plaintiff was represented by an attorney who is of counsel for the plaintiff in the present action.

30. Pursuant to the decision by the Supreme Court mentioned in finding 29(c), the plaintiff was released from the United States Penitentiary at Lewisburg, Pennsylvania, on February 5, 1960.

31. (a) In November 1957, the plaintiff submitted to the Civil Service Commission an application for the refund of the amount credited to him in the retirement fund. In his application, the plaintiff indicated that his service had ended on February 28, 1954.

(b) Pursuant to the plaintiff's application, the Civil Service Commission refunded to the plaintiff $1,996.43 representing deductions from his pay, plus interest of $423.12, or a total of $2,419.55.

(c) The plaintiff sent $1,000 of this money to his children, and out of the remainder he defrayed the expenses involved in the habeas corpus proceedings referred to in finding 29, including attorney's fees.

32. (a) Following his release from the United States Penitentiary at Lewisburg, Pennsylvania, the plaintiff obtained a job in late March of 1960 as a salesman in the boy's depart-

ment of a clothing store operated by Levi Brothers in Louisville, Kentucky. In this job, he had a "draw," or guaranteed wage, of $45 a week, plus certain premiums for selling slow-moving garments. He worked in this job from March until December of 1960. His pay did not exceed $50 in any week.

(b) In December 1960, the plaintiff obtained a slightly better job with the Richman Brothers Clothing Store in Louisville, Kentucky. In this job, he had a guarantee of $50 a week or commissions, whichever was higher. During the Christmas season, he made more than $50 a week, but not at other times.

(c) The plaintiff was still employed by Richman Brothers at the time of the trial. In March 1961, he was transferred from Louisville to a branch store in Glendale, California, and he was working in that store at the time when he filed his petition on November 15, 1962. During the period from March 1961 until November 1962, the plaintiff's earnings were at an annual rate of from $4,500 to $4,800 per year.

33. (a) The plaintiff filed an application with the Army Board for Correction of Military Records for a hearing and relief.

(b) In a communication dated July 27, 1961 and addressed to the plaintiff's attorneys, the Executive Secretary of the Army Board for Correction of Military Records stated in part as follows:

> The Army Board for Correction of Military Records has considered the application submitted by you for the correction of records of Mr. Albert H. Grisham and the brief submitted in support of that application. None of the matters urged by you are considered such errors or injustices as would require the correction of military records. Therefore, your request for a hearing and relief are denied.

34. As of the respective dates on which the plaintiff was placed on leave without pay and removed from his civilian position, Section 4 of the Civilian Personnel Regulations promulgated by the Department of the Army contained the following provisions (among others):

(a) Subparagraph *d* of paragraph 4–1 stated in part that:

> Each employee for whom an adverse action is proposed is entitled to an advance notice thereof and has a

right to reply with a statement of reasons showing why the action should not be taken. * * *

(b) Subparagraph *a* of paragraph 4–2 stated that:

"Removal" is the action used in separating an employee on charges of delinquency or misconduct.

(c) Subparagraph *c* of paragraph 4–2 stated that:

Removals will not be effective until the expiration of the advance notice prescribed in paragraph 4–1*d* and appendix B, nor prior to the date the employee has *received* notice of the adverse decision.

35. (a) Appendix B to the Civilian Personnel Regulations promulgated by the Department of the Army was entitled "Job Protection Procedures." Appendix B began with the following introductory statement:

The following procedures must be observed in processing any action discussed in section 4. The provisions of the requirement column apply to all employees without regard to type or tenure of appointment * * *.

(b) The requirement column of Appendix B provided as follows:

1. The employee must receive written advance notice identifying the proposed adverse action.

a. The advance notice must state any and all reasons, specifically and in detail, for taking the adverse action.

b. The advance notice must state the date when it is planned to make the proposed adverse action effective.

c. The advance notice must state that the employee has a right to reply personally and in writing. It also must state the time within which reply must be made, and the fact that the reply will be considered.

d. The advance notice must specify the employee's status during the advance notice period.

e. The advance notice must be dated and signed.

2. There must be a decision made as to what action will be taken.

3. The employee will receive a written notice of the appointing officer's decision.

a. Notice of decision must be dated and signed by the appointing officer, and the date stated when any adverse action will become effective.

b. The notice of decision must state the basis for the decision.

c. Any notice of decision involving an adverse action must advise the employee of his appeal rights.

36. The parties stipulated at the pretrial conference, with the concurrence of the commissioner, that the initial trial would be limited to the issue of liability, and would not relate to the question of damages.

CONCLUSION OF LAW

Upon the foregoing findings of fact, which are made a part of the judgment herein, the court concludes as a matter of law that the plaintiff is not entitled to recover and the petition is, therefore, dismissed.

APPENDIX B

Address Reply To
District Engineer
Nashville District
Corps of Engineers
P. O. Box 1070
Nashville 2, Tennessee

CORPS OF ENGINEERS, U. S. ARMY
OFFICE OF THE DISTRICT ENGINEER
NASHVILLE DISTRICT
306 Federal Office Building
Nashville, Tennessee

Attachment 1 to Pl's motion for S-J

Refer to File No.
OVMPE

11 October 1957

Mr. Albert H. Grisham
Box No. PMB 20854
Lewisburg, Pennsylvania

Dear Albert:

Your letter of 6 October 1957 has been referred to me for reply.

Your file has been forwarded to St. Louis and the only record here is your service record card. This record shows that you were carried on LWOP from 28 August 1953 through 28 February 1954, and were removed from the service on 28 February 1954. For the purpose of your retirement annuity, in the event you do not draw out the money, you have 22 years and 7 months of creditable service which includes military, etc.

It is assumed that your failure to get a copy of the SF-50 effecting your removal was due to the fact that we had no information as to where to address your mail for such a long time.

Miss Childers will copy your service record which I will enclose, and as you requested am sending you the application for refund, partially completed.

We think and speak of you often, Albert, and wish the best for you. If we can be of further assistance in your employment records, please let us know.

Kindest regards,

S/ Pearle

PEARLE

2 Incls.
Form 2802 (dupe)
Service record

FILED
AUG 26 1965
COURT OF CLAIMS

U. S. COURT OF CLAIMS
GRISHAM vs. U.S.A.
vs. U. S. No. 363-62
PLTF DEFT Exh. No. 12

D12

APPENDIX C

Extracts from Record of Respondent's Positions with Reference to Power of Court of Claims To Review Court-Martial Convictions

Defendant's Reply Brief to Plaintiff's Motion for Summary Judgment filed February 28, 1964 (R. 103-145):

> "If plaintiff's dismissal in 1954 was improper, he has had a claim thereon since the date of the dismissal" (R. 109).
>
> "* * * plaintiff could have attacked the court-martial jurisdiction in any court where he had a cause of action. Therefore, his contention that he had no cause of action until the Supreme Court's decision in 1960 must fall". (R. 113)
>
> "The record demonstrates that plaintiff's cause of action accrued on February 28, 1954. Clearly he could have sued at any time subsequent to the administrative action". (R. 120)

Defendant's Brief to the Court filed October 16, 1967 (R. 146-230):

> "However, if the instant plaintiff were not validly fired or placed on leave without pay he could have sought a money judgment for the salary of his position as early as 1953". (R. 160-161)

APPENDIX D

Extracts from Record of Respondent's Contention Petitioner Was Not Ready, Willing and Able To Work

Defendant's Reply Brief to Plaintiff's Motion for Summary Judgment, filed February 28, 1964 (R. 103-145);

> "* * * Plaintiff is not entitled to recover as a matter of law, inasmuch as he was not ready, willing and able to work during the period of his claim". (R. 127)
>
> "Moreover, as to the merits of plaintiff's claim, the record before the Court demonstrates that plaintiff was not ready, willing and able to work during the period claimed for". (R. 129)

Defendant's Brief to the Court, filed October 16, 1967 (p. 53, R. 146-230):

> "* * * he cannot recover compensation for the period when he was imprisoned because his loss of compensation for that period was not caused by his removal but by his unavailability for work". (R. 230)

APPENDIX E

Extract from Army Regulation No. 633-10 (1959):

"4. Responsibility for required clemency consideration. Each prisoner will be considered for clemency in accordance with paragraph 5 by the authorities designated as follows:

"c. Disciplinary barracks and Federal Institutions. Each prisoner serving a sentence in a disciplinary barracks or Federal penal or correctional institution will be considered for clemency by the Secretary of the Army. * * * wardens of Federal penal and correctional institutions are responsible for furnishing the Provost Marshal General, Headquarters, Department of the Army, case histories of Army prisoners, together with their recommendations concerning * * * clemency".

"5. Time of clemency consideration. a. Prisoners will be considered for clemency * * * as follows:

* * *

(3). In cases in which the confinement is 2 years or more, not earlier than 6 months nor later than 8 months from the date the sentence to confinement became effective and annually thereafter.

(4). In any case at any time prior to completion of the sentence, upon recommendation for cause.

Extract from Department of Defense Instruction Sheet 1325.4, January 14, 1955, Paragraph III P 1.

1. *Clemency.* At such times as may be directed by the Secretary of the Department concerned and prior to completion of confinement or execution of the discharge, sentences imposed by courts-martial or other military tribunals which include sentences to confinement of eight months or more and all sentences which include discharge or dismissal will be reviewed to determine conformity with current administrative and disciplinary policies, to adjust sentence disparities, and to make appropriate recom-

mendations regarding any unexecuted portions of the sentence. Members of the Armed Forces of the United States sentenced by courts-martial or other military tribunals to confinement and discharge or dismissal, and persons other than members of the Armed Forces of the United States sentenced to confinement by courts-martial or other military tribunals will be eligible to be considered for clemency, wherever confined as follows:

a. Within 8 months after the sentence begins to run, or prior to release if the sentence expires earlier, and at least annually thereafter.

b. At any time prior to completion of the sentence, upon recommendation of appropriate authority for cause.

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 300

ALBERT H. GRISHAM, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion and findings of the Court of Claims (Pet. App. A. 20–35) are reported at 392 F. 2d 980.

JURISDICTION

The judgment of the Court of Claims was entered on April 19, 1968. The petition for a writ of certiorari was filed July 17, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTIONS PRESENTED

1. Whether, in applying the doctrine of laches to a suit for back pay, the Court of Claims may consider

316-869—68

the period during which a discharged government employee was in prison pursuant to a sentence of a court-martial later held to have been without jurisdiction over his person.

2. Whether, even if the period of confinement be excluded, his delay of two years and nine months after his release before filing this suit bars the action under the laches doctrine.

3. Whether petitioner's action was barred for failure to exhaust his administrative remedies.

STATEMENT

In 1952, petitioner, a civilian employee of the Army Corps of Engineers, was temporarily assigned to a military command of the United States Army, for service in Orleans, France. On December 6, 1952, petitioner was arrested by the French authorities for murdering his wife. Shortly thereafter, the Army requested jurisdiction over petitioner and the French released him to American custody. On March 27, 1953, he was convicted of murder by a general court martial. His conviction was approved by the reviewing authorities, and the Court of Military Appeals affirmed the findings and sentence in February 1954.

In the meantime, while awaiting trial, petitioner had requested the Corps of Engineers to pay him for his annual leave and then to carry him on leave without pay until the situation was clarified. His request was honored, and he was placed on leave-without-pay status commencing February 24, 1953, when his annual leave was exhausted, "pending review of Court Martial Sentence." On February 26, 1954, after the

conviction was affirmed by the Court of Military Appeals, the Corps of Engineers mailed to petitioner a notice that he was to be separated from the service for notorious misconduct. Petitioner, however, never received this notice; he testified that he remained under the impression that he was on leave without pay until advised by an employee of the Corps of Engineers in October 1957, that he had been discharged.[1]

Later that month, relying on this Court's June 10, 1957, decision in *Reid* v. *Covert*, 354 U.S. 1, petitioner—then confined at the federal penitentiary at Lewisburg, Pennsylvania—filed a petition for a writ of habeas corpus. The lower courts denied relief but on January 18, 1960, this Court held that petitioner's court-martial had been without jurisdiction over him. *Grisham* v. *Hagan*, 361 U.S. 278. Petitioner was released from confinement on February 5, 1960.

At no time while petitioner was pursuing his habeas corpus action through the courts did he protest his discharge from the Corps of Engineers, either to the Corps of Engineers, to the Civil Service Commission, or to the courts.[2] Nor did he make any protest for nearly three years following this Court's holding that

[1] But see Ct. Cl. Finding 31(a), Pet. App. 32.

[2] In November of 1957 petitioner did apply to the Civil Service Commission for a refund of the amount credited to him in the retirement fund. In his application he indicated that his service had ended on February 28, 1954 (Ct. Cl. Finding 31(a), Pet. App. 32). From the filing of his habeas corpus petition in October 1957, petitioner has been continuously represented by counsel (Ct. Cl. Finding 29(d), Pet. App. 32). See, also, *Grisham* v. *Taylor*, 161 F. Supp. 112 (M.D. Pa.), affirmed, 261 F. 2d 204 (C.A. 3), reversed *sub nom. Grisham* v. *Hagan*, 361 U.S. 278.

his conviction was invalid. It was not until November 15, 1962, that he filed this action seeking to recover back pay for the period he was in prison.

The Commissioner of the Court of Claims held that the suit was barred by the six-year statute of limitations[3] and that, alternatively, petitioner's delay of two years and nine months in filing suit after his release from confinement constituted laches. The Court of Claims found it necessary to discuss only the laches defense and held the action barred because filed more than five years after October 1957—by which time *Reid* v. *Covert* had been decided and petitioner notified of his discharge.

ARGUMENT

Although petitioner seeks to relate this case to *United States* v. *Augenblick,* pending on writ of certiorari, No. 45, this Term, the instant case involves very different questions, presents an unusual factual situation unlikely to recur, and was correctly decided below.

1. The Court of Claims permissibly held that petitioner's suit was barred by laches because of his failure to sue until November 1962, five years after learning of his discharge. Petitioner rested his claim for back pay on the contention that under the Veterans' Preference Act and Army regulations (Pet. App. 25) he was entitled to actual notice of his place-

[3] The Commissioner held that the statute started to run on the date of discharge, February 28, 1954—and that since there was no showing of fraudulent concealment by the government, petitioner's ignorance of the claim until 1957 did not toll the statute.

ment on leave without pay and of his impending discharge, and that failure to follow these procedures vitiated the personnel action taken.[4] This ground of suit, however, was available to petitioner in 1957, after he learned of his discharge. Petitioner contends (Pet. 11–12) that he could not have recovered in 1957, since his claim for back pay would have been met by the defense that a person may not recover back pay for any period during which he was unable to work. *United States* v. *Wickersham,* 201 U.S. 390; *Everett* v. *United States,* 169 Ct. Cl. 11, 15–16 (back pay may not be recovered for period in which employee was physically disabled from working). To meet this defense, petitioner argues, he would have had to show that his inability to work was caused by imprisonment pursuant to an invalid conviction which should not be applied against him. But, he continues, the invalidity of the conviction may only be established in a habeas corpus proceeding.[5]

The government has taken the position that the Court of Claims is without jurisdiction to review the validity of court-martial convictions in military back-pay cases, and this Court has granted certiorari to

[4] Thus, the case is unlike *Augenblick*, where removal from the service was ordered by the sentence of an allegedly invalid court-martial. Here petitioner's cause of action did not directly involve the power *vel non* of the Court of Claims to review court-martial convictions; rather, petitioner sought to invoke that court's authority to determine compliance with civilian personnel procedures.

[5] As explained in note 9, p. 8, *infra*, it is our view that the invalidity of petitioner's conviction would not negate the defense that he may not recover back pay for the period he was in prison.

resolve the question.[6] As a practical matter, however, the Court of Claims in 1957 would have considered petitioner's contention that his court-martial conviction was invalid, if it were deemed relevant to his claim. Ever since its decision in *Shapiro* v. *United States,* 107 Ct. Cl. 650, 69 F. Supp. 205 (1947), the Court of Claims has asserted the power to review court-martial convictions in back-pay actions, and has entertained numerous such claims on the merits. Thus, whatever remedy petitioner claims now, it was equally available—or equally unavailable—to him in 1957. The Court of Claims acted reasonably in finding laches a bar when petitioner delayed so long before invoking the consideration of the court. The court's findings of excessive delay by petitioner and resulting prejudice to the government (Pet. App. 24–26) are justified. See, also, *Jackson* v. *United States,* 179 Ct. Cl. 29, certiorari denied, 389 U.S. 985. The fear that the government might raise a troublesome affirmative defense does not excuse a consequent delay in filing suit.[7]

2. Moreover, as the commissioner of the Court of Claims held, petitioner is chargeable with laches even

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[6] *Augenblick* v. *United States* and *Juhl* v. *United States,* 377 F. 2d 586, 383 F. 2d 1009 (Ct. Cl.), certiorari granted, 390 U.S. 1038.

[7] In challenging a defense that his incarceration precluded him from being ready, willing, and able to work, petitioner might well have argued—as this Court held—that he was not subject to the Uniform Code of Military Justice, under which he was court-martialed. In that context, the finality clause of the Code, 10 U.S.C. 876, which we argue in *Augenblick* precludes collateral review of a court-martial, may be inapplicable to a civilian not subject to the Code.

if his period of imprisonment is excluded from consideration. He waited two years and nine months after his release from confinement before bringing suit. Much shorter periods of delay have been held to warrant application of laches to back pay actions. *Arant* v. *Lane*, 249 U.S. 367 (1 year and 8 months); *Norris* v. *United States*, 257 U.S. 77 (11 months); *Grasse* v. *Snyder*, 192 F. 2d 35 (C.A.D.C.) (1 year and 4 months); cf. *Jones* v. *Summerfield*, 265 F. 2d 124 (C.A.D.C.), certiorari denied, 361 U.S. 841 (2 years and 9 months). As this Court stated in *Arant* v. *Lane*, *supra* (249 U.S. at 372):

> When a public official is unlawfully removed from office, * * * obvious considerations of public policy make it of first importance that he should promptly take the action requisite to effectively assert his rights, to the end that if his contention be justified, the Government service may be disturbed as little as possible and that two salaries shall not be paid for a single service.

3. Even if laches were not applicable, petitioner's suit would be barred by his failure to exhaust administrative remedies. As a veterans-preference eligible, petitioner was entitled to appeal his removal to the Civil Service Commission. In 1957, when he first learned of his removal, he had legal counsel (see n. 2, *supra*) and thus cannot plead ignorance of his rights.[8] It has been held repeatedly that an employee who does not pursue his appellate remedy in the Civil

[8] Civil Service Commission regulations required an appeal to be filed within 10 days of the adverse action—which occurred here on February 28, 1954. However, the regulations provided

Service Commission may not later challenge the basis for his removal. See, *e.g.*, *Hatton* v. *United States*, 173 Ct. Cl. 1187, certiorari denied, 384 U.S. 965; *Blackmar* v. *United States*, 354 F. 2d 340 (Ct. Cl.). Requiring a claimant to exhaust administrative remedies permits the government to correct errors on the administrative level, and thus to mitigate or avoid large damage claims that might otherwise be created. *United States* v. *Holpuch Co.*, 328 U.S. 234, 239. Thus, if petitioner had promptly applied to the Civil Service Commission for relief in October 1957, and the Commission had determined that the removal procedure violated the Veterans Preference Act, the Corps of Engineers could then have pursued proper procedures to avoid further accrual of a back pay claim.[9]

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for an extension, in the discretion of the Commission, "upon a showing by the employee that he was not notified of the applicable time limit and was not otherwise aware of the limit or that circumstances beyond his control prevented him from filing an appeal within the prescribed time limit." Section 22.302(d), 20 Fed. Reg. 2701 (April 23, 1955). There is no reason to believe that the Commission would have refused to waive the time limit, upon a showing that petitioner did not learn of his discharge until October 1957. Petitioner's habeas corpus action, in which he was represented by counsel, was filed on October 26, 1957, only 15 days after the date of the letter by which petitioner claims that he was first informed of his discharge.

[9] Since the Court of Claims found it unnecessary to reach the merits of petitioner's suit, we shall do no more than suggest that he would not have prevailed even if the suit were entertained. Recovery in back pay actions is limited to those periods during which the claimant would have been able to work, had he not been discharged. See *United States* v. *Wickersham*, *supra*, 201 U.S. at 399–400. And under the Back Pay Act, 5 U.S.C. 5596, an employee may recover only the pay which he

CONCLUSION

The petition for a writ of certiorari should therefore be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.
EDWIN L. WEISL, JR.,
Assistant Attorney General.
JOHN C. ELDRIDGE,
ROBERT V. ZENER,
Attorneys.

AUGUST 1968.

"normally would have earned during that period if the [defective] personnel action had not occurred". Here, if petitioner had not been removed, he would have continued on leave-without-pay status, as he had requested, and would in addition have been unavailable for work. His loss of pay was the consequence, not of the failure to afford him actual notice of the impending dismissal, but rather of his inability to render service during confinement. It is, of course, not the function of back pay actions to award damages for a criminal conviction that is later overturned. Congress has provided a remedy in some such cases, but petitioner cannot avail himself of it. Thus, the Court of Claims may award damages of up to $5,000 to any person whose conviction of an offense against the United States, including a court-martial (see *Roberson* v. *United States*, 129 Ct. Cl. 581, certiorari denied, 349 U.S. 954), is set aside on grounds of innocence. 28 U.S.C. 1495, 2513. Petitioner's conviction, however, was not set aside on grounds of innocence, and it seems likely that his back pay recovery would exceed $5,000. Thus his action is, in effect, an attempt to extend the scope of the "unjust conviction" statute.

U.S. GOVERNMENT PRINTING OFFICE: 1968